

CRIMINAL LIABILITY OF EMPLOYEES OF FINANCIAL INTERMEDIARIES FOR MONEY LAUNDERING: A BRITISH PERSPECTIVE

Introduction

In September 2002, the U.K. legislation concerning money laundering is in a time of transition. The Proceeds of Crime Act 2002¹ was passed in July of this year, but will not come into force until December, or possibly even the beginning of 2003. The Act is principally designed to improve the U.K.'s record on confiscating the proceeds of crime, through both criminal and civil proceedings. But it also radically alters the general provisions, and hence liability, regarding money laundering.

Since, however, "the old regime" is still in place at the time of writing, it is worth examining it first. Essentially, money laundering offences are divided into two categories: on the one hand, those connected with the actual laundering of money and, on the other, failures to carry out measures designed to guard against an institution unwittingly assisting in money laundering. The first category is currently dealt with by means of a number of criminal statutes, the latter through the Money Laundering Regulations 1993.²

Before continuing, however, it is necessary to make the point that most of the money laundering offences under U.K. law impose liability on financial intermediaries (or institutions) and their employees alike. Repeated throughout the provisions, both in the current legislation and in the Proceeds of Crime Act 2002 that in large part will replace them, is the phrase "A person is guilty of an offence if..." Unlike that of many jurisdictions, including a number of EU Member States, the reach of U.K. criminal law extends equally to natural persons, ie. individuals, and legal entities. In cases of money laundering, the institution can be fined and the employees found to have committed the relevant acts (or, where appropriate, omissions) can be sent to jail.

The positions of the Money Laundering Reporting Officer (MLRO) and the Compliance Officer also need to be considered, particularly as they are frequently one and the same person. The role of the MLRO is examined in detail below; for now, it suffices to say that the MLROs and Compliance Officers are frequently employees, not directors, and, as this year's Cambridge International Symposium on Economic Crime delicately put it, they are in the front line. Any criminal liability that descends on the institution and its management will, in most cases, descend with equal force on the MLRO personally.³

¹ This and all other legislation referred to in this paper may be accessed on the following website: www.legislation.hmso.gov.uk/acts.htm

² SI 1993/1933

³ The one exception is that of tipping-off offences.

The current law on drugs and general crime money laundering

So, to the offences. Actual money laundering and its related offences is currently covered by not one but three separate statutes: the Drug Trafficking Act 1994, the Criminal Justice Act 1988 (as amended by the Criminal Justice Act 1993⁴) and the Terrorism Act 2000. This shows the piecemeal approach taken by the U.K., in common with many other jurisdictions. To begin with, the focus was on the fight against drug trafficking and the aim of disrupting its money supply. This was implemented in the Drug Trafficking (Offences) Act 1986, since replaced by the 1994 Act. But this Act only covered the proceeds of drug trafficking⁵ (and, later, funds linked to drug trafficking, for example funds, from whatever source, with which controlled drugs were to be bought). Later the Criminal Justice Act 1993 and the Proceeds of Crime Act 1995 were passed, in order to cover general crime; both of these amended the Criminal Justice Act 1988. It is, however, to be noted that drug trafficking offences were specifically left outside their scope and left under separate legislation.

Terrorist money laundering was and is viewed as a separate category, for many years dealt with only under provisional anti-terrorism legislation renewed each year and now covered by the Terrorism Act 2000. The principal reason for this is that much of the funds used for terrorist purposes do not have a criminal origin. Some, of course, do, as is discussed below. But others consist of funds which were earned quite legitimately. An important source of funds for the Provisional IRA, for example, was donations from supporters' organisations, particularly in the United States, Australia and the mainland United Kingdom. This was supplemented by "charity collections" in some of the expatriate Irish pubs and bars. These donations were derived from supporters' legitimate salaries. More recently, one of the sources of funds for the Al-Qaida organisations proved to be a chain of shops in a number of Arab states selling honey. Provisions aimed at catching the proceeds of crime will therefore not be wholly effective against terrorist financing; specialist provisions were therefore needed, which are discussed separately, below.

Before looking at the specific money laundering provisions, it should be noted that the Criminal Justice Act 1988 does not cover all non-drug offences. It refers to the proceeds of "criminal conduct". Like that of some other jurisdictions, the English criminal justice system divides offences into three categories. The most serious are those triable on indictment, ie. which can only be tried before a judge and jury in the Crown Court; examples are murder, rape and assaults which deliberately cause very serious injury. At the other extreme are those triable summarily, ie. before a Magistrates' Court with no jury. These include most road traffic offences and also such offences as selling alcohol to a person under the age of 18 or selling alcohol at all outside the hours permitted by law.⁶

⁴ And also by the Proceeds of Crime Act 1995, although its provisions fall outside the scope of this paper.

⁵ Compare the EU Money Laundering Directive (Council Directive 91/308/EEC) before its amendment in December 2001: only offences listed under the Vienna Convention, ie. drug trafficking offences, were covered.

⁶ In England and Wales, pubs are only permitted to serve alcohol between 11.00 am and 11.00 pm on Mondays to Saturdays and between 12.00 pm and 10.30 pm on Sundays. Serving alcohol outside these hours is a criminal offence.

In between come the vast majority of offences, which are triable either way. "Criminal conduct" covers "indictable offences", ie. those triable either on indictment or either way, but, with very few exceptions, not summary offences. It also, notably, covers any act committed abroad which, had it been carried out in the U.K., would have constituted an indictable offence. As an exception, as mentioned above, drug trafficking offences, wherever committed, are excluded. Section 1 of the Drug Trafficking Act 1994 does, however, make clear that that Act covers all drug trafficking offences, wherever committed, although the proviso is laid down that the act must be an offence where it was committed.

The Criminal Justice Act 1988 (as amended) and the Drug Trafficking Act 1994 in many ways run in parallel. They create a number of specific offences. The first is laundering itself. Section 49(1) of the Drug Trafficking Act 1994 relates to the drug traffickers themselves, but section 49(2) and the provisions which following are of direct bearing on financial intermediaries and their employees. Section 49(2) and (3) state:

"(2) A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of drug trafficking, he -

(a) conceals or disguises that property, or

(b) converts or transfers that property or removes it from the jurisdiction,

for the purpose of assisting any person to avoid prosecution for a drug trafficking offence or the making or enforcement of a confiscation order.

(3) In subsections (1)(a) and (2)(a) above, the references to concealing or disguising any property include references to concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it."

The wording of this provision, which is mirrored in section 93C of the Criminal Justice Act 1988, shows that the culpability of the employee of the financial intermediary is quite great. Firstly, he must know, or at least have reasonable grounds to suspect, that the money is the proceeds of drug trafficking (or criminal conduct as the case may be). But secondly, perhaps more significantly, the concealment, etc. must be for the purpose of frustrating a criminal investigation or confiscation order. The seriousness of the offence is reflected by the severity of its punishment: up to 14 years' imprisonment. In addition or as an alternative, an unlimited fine may be imposed, but in practice, a fine would only be imposed in money laundering cases on a corporation: while the imposition on an individual of, for the same offence, both a prison sentence and a large fine is common in the United States, it is not the norm in the U.K.

The offence more likely to catch the unwary employee of a financial intermediary is that of assisting another to retain the benefit of drug trafficking under section 50 of the 1994 Act. This is mirrored in section 93A of the Criminal Justice Act 1988, which applies it to

criminal conduct and also carries up to 14 years' imprisonment. The wording in the Acts is particularly complicated, but essentially, the offence applies where a person, eg. a financial intermediary, enters into an arrangement enabling or assisting another person to retain or control the proceeds of drug trafficking or criminal conduct, eg. by concealment, removal from the jurisdiction or transfer to nominees, although the phrase in the Act "or otherwise" shows that this list is far from exhaustive. Also covered is where the intermediary arranges for the funds to be placed at the person's disposal or for them to be used to buy investment property.

For this offence to be committed, the intermediary must know or at least suspect that the person on whose behalf he makes the arrangements is, or has been, involved in drug trafficking (or criminal conduct) or, alternatively, has benefited from it.⁷ The latter refers to the common scenario whereby the criminal places assets in the name of someone else, often a family member.

There still remains, however, an escape route for the intermediary; they will not be held liable if they report their suspicion (or indeed knowledge!) that the funds derive from drug trafficking or criminal conduct. This must be done before processing the transaction or at least as soon as is reasonably practicable thereafter. (Where it is after the transaction has been processed, the report must be made on the institution or individual's own initiative.) The Acts require the report to be made to "a constable", ie. a police officer, but in practice, it is made not to the nearest police station but to the National Criminal Intelligence Service (NCIS). For employees, however, it will suffice for the report to be made to a nominated superior. Under the Money Laundering Regulations, the financial institution is required to set up a system whereby such reports may be made. There will be a Money Laundering Reporting Officer (MLRO) or, in a large organisation, several MLROs but there will also very often be a system whereby a junior employee will report not directly to the MLRO (although they are, of course, entitled to do so) but to their immediate manager. Whatever the arrangements under the system are, they must be clearly set out in an office manual and, furthermore, the firm is obliged to instruct all staff in them as part of the anti- money laundering training required under the Money Laundering Regulations. Once the junior employee makes a report to the nominated superior, they are absolved from liability; in effect, the liability is shifted to the manager of MLRO unless and until they make a report, ultimately to NCIS.

The next offence, found in both Acts⁸ and therefore applied to the proceeds of both drug trafficking and criminal conduct, is acquisition, use or possession of the proceeds in question. For this offence, actual knowledge is required that the property is the proceeds of drug trafficking or, alternatively, of criminal conduct. In any case, it is likely to impose liability on the financial institution rather than any individual employee since it is the institution that will have the use or possession of the funds. Again, the offence is punishable with up to 14 years' imprisonment and / or an unlimited fine.

⁷ Or, as the case may be, criminal conduct.

⁸ Drug Trafficking Act 1994, s. 51; Criminal Justice Act 1988, s. 93B.

A far greater risk to an employee is that of committing the offence of "tipping off" under section 53 of the 1994 Act or section 93D of the 1988 Act. This is, prima facie, warning the client that:

- a money laundering investigation is being now, or might in the future be, undertaken into their affairs, or
- a report has been made, either to NCIS or to a superior under the money under the money laundering reporting structure.

The wording of the Acts is, however, wider than this:

"A person is guilty of an offence if -

- (a) he knows or suspects that a constable is acting, or is proposing to act, in connection with an investigation which is being, or is about to be, conducted into money laundering; and
- (b) he discloses to any other person information or any other matter which is likely to prejudice that investigation, or proposed investigation."⁹

The following subsections concern similar disclosure of potentially prejudicial information following a report, respectively, to NCIS and by an employee to a nominated superior; it is an offence to disclose anything which may prejudice any investigation which might be carried out following that report. There is, however, a defence afforded where the defendant proves that he neither knew nor suspected that what he disclosed would be prejudicial to any investigation.¹⁰ It is, however, up to the accused to prove this and in any case it will only be raised once proceedings have been brought. Similarly, a lawyer is exempt where he discloses such matters to his client in the course of giving legal advice or in preparation of legal proceedings, although this protection is removed in cases where the disclosure is made with a view to furthering a criminal purpose.¹¹

The scope of these provisions is wide, covering not just information but "any matter" and also not just investigations which are definitely underway, or at least planned, but also any which might take place in the future. This has raised considerable concern amongst the financial sector in the U.K. Since, however, the provisions have been carried over into the Proceeds of Crime Act 2002, it is proposed to deal with these concerns when discussing that Act below.

It is recognised that the offence of tipping off is less serious than actual complicity in money laundering and thus the maximum sentence of imprisonment is only 5 years.

⁹ Criminal Justice Act 1988, s. 93D(1), mirrored in Drug Trafficking Act 1994, s. 53(1)

¹⁰ Subsection (6)

¹¹ Subsections (4) and (5)

Finally, there is the offence, under section 52 of the Drug Trafficking Act, of failing to report knowledge or suspicion of money laundering:

"A person is guilty of an offence if -

- (a) he knows or suspects that another person is engaged in drug money laundering,
- (b) the information, or other matter, on which that knowledge or suspicion is based came to his attention in the course of his trade, profession, business or employment, and
- (c) he does not disclose the information or other matter to a constable as soon as is reasonably practicable after it comes to his attention."

The offence, like that of tipping off, carries up to 5 years' imprisonment.

As with other reporting requirements, the reference to "a constable" in practice refers to NCIS and employees may also discharge their obligation by making a report to their superiors in accordance with procedures laid down by their institution.¹²

Two points need to be noted in relation to this provision. Firstly, lawyer-client privilege is maintained. Section 52(2) states clearly: "Subsection (1) above does not make it an offence for a professional legal advisor to fail to disclose any information or other matter which has come to him in privileged circumstances". This is, however, qualified. "Privileged circumstances" only cover communications relating to the giving of legal advice. A lawyer who is merely instructed, for example, to buy a house or some other investment on behalf of his client will therefore not be covered. Furthermore, any communication which is made with a view to "furthering any criminal purpose" is excluded: the lawyer must not become a tool for his drug-trafficker client's money laundering, drug trafficking or any other criminal activities.

Secondly, it currently only applies with regard to the proceeds of drug-trafficking offences; there is no equivalent provision in the Criminal Justice Act 1988.¹³ Where, therefore, a financial institution (or its employee) suspects that a potential client is involved in laundering the proceeds of non-drugs crime, for example trafficking in human beings, organised prostitution or the distribution of child pornography, they have the option of simply declining to accept that person's business and doing nothing more. business relationship. Of course, where the suspicion, let alone knowledge, arises in relation to an existing client, the situation is more complicated since the institution may well already have unwittingly assisted the client in the laundering of his funds. It could be argued that since, in relation to the previous transactions, the institution and its staff had no knowledge or suspicion that anything was amiss, they committed no offence and

¹² Section 52(5)

¹³ There is, however, an absolute duty to disclose suspicion of terrorist funding under the Terrorism Act 2000, discussed below.

therefore they are safe in simply closing the account now. Explaining this to both law enforcement and the regulators in a subsequent investigation is unlikely to be a comfortable experience, however, and the institution would be well advised in such a situation to make a report.¹⁴ Certainly an employee who comes to suspect an existing client will need to make a report to his or her superiors: this will be a decision for the institution's management, not an individual employee.

The Proceeds of Crime Act 2002

These, then, are the existing provisions. As mentioned in the Introduction, however, the situation will change around the end of this year with the coming into force of the Proceeds of Crime Act 2002. The new provisions are to be found in section 327ff. of the Act.

The first point to be noted is that the Act covers the proceeds of all criminal offences: section 340(2) states:

"Criminal conduct is conduct which -

- (a) constitutes an offence in any part of the United Kingdom, or
- (b) would constitute an offence in any part of the United Kingdom if it occurred there."

The proceeds of drug trafficking and other types of crime will therefore be put together under one regime. Furthermore, the reach of the Act goes further than the previous legislation. The proceeds of summary offences will also now be covered. At first glance, this may not seem significant: many summary offences do not give rise to any profits. But a number do. As mentioned above, the offences under the laws regulating the sale of alcohol in the United Kingdom are summary offences. It is a summary offence across the U.K. to sell alcohol to persons under the age of 18; similarly, it is a summary offence in England & Wales (although not Scotland¹⁵) for a pub to sell alcohol outside certain prescribed hours. In almost every town, however, there is at least one pub which regularly commits one or both of these offences and of course profits (sometimes substantial ones) result. Incidentally, the divergence in the law between England and Scotland relating to when a pub is permitted to serve alcohol raises an issue which those drafting the Act almost certainly never considered: serving beer in a pub in Edinburgh at 11.30 pm, even though quite legal, will nonetheless be criminal conduct for these purposes since, if it occurred in London, it would constitute an offence there!

¹⁴ In any case, such suspicions will need to be reported once the Proceeds of Crime Act 2002 comes into force: see below.

¹⁵ The United Kingdom is made up of not one but three jurisdictions: England & Wales, Scotland and Northern Ireland, each with its own laws and legal system. Although many laws are common across all three jurisdictions, some are confined in their application to only one or two.

The intention of the Act's extra-territorial reach (which existed in the previous legislation) was to catch acts committed outside the U.K. altogether. Unlike some other countries, such as France and, to a lesser extent, the United States, the reach of the U.K.'s criminal law beyond our shores remains very limited: for the most part, acts committed abroad are not criminal offences under U.K. law.¹⁶ The example most frequently cited is foreign corruption; although it is now a criminal offence for a British national to pay bribes outside as well as inside the U.K.¹⁷, this does not extend to foreign nationals. It is, however, quite clear that the fact that bribes were paid abroad and by foreign nationals does not entitle U.K. financial institutions to receive and process them. This should be relatively uncontroversial: whether or not they are enforced in practice, the criminal laws of most jurisdictions prohibit the payment of bribes, at least to public officials. But it is clear that the Act extends to acts which were not criminal offences in the jurisdictions where they were committed. For example, in Spain, insider dealing is in most circumstances merely an administrative offence; it only becomes an offence under the Criminal Code where the profits derived are at least €450,760¹⁸. Thus even though an act of insider dealing in Spain which derived a profit of €300,000 would not be a criminal offence, any part of those profits would, if transferred to the U.K., be caught by the Act.

In addition, past offences, ie. those committed before the Act comes into force, are covered. Section 340(4)(c) makes clear: "It is immaterial ... whether the conduct occurred before or after the passing of this Act." The position of financial intermediaries who belatedly come to suspect their clients thus potentially becomes very difficult.

Many of the offences are similar to those under the current legislation, but they have been considerably simplified. Section 327(1) states:

"A person commits an offence if he -

- (a) conceals criminal property;
- (b) disguises criminal property;
- (c) converts criminal property;
- (d) transfers criminal property;
- (e) removes criminal property from England and Wales or from Scotland or from Northern Ireland."

Unlike the equivalent measures which preceded it, there is no requirement for any knowledge or suspicion, nor is there any mention of a purpose to frustrate a prosecution or a confiscation order. In other words, there is strict liability - and the penalty is up to 14 years' imprisonment. This is offset by the inclusion of the defence of making a report, to NCIS in the case of the institution or its management or, in the case of an employee, to a nominated officer of the institution. In fact, however, the institution and its staff will be required to make a report in any case, as discussed below.

¹⁶ The principal exceptions are: murder, treason, sex with children and war crimes. War crimes remain the only example, however, of where the reach of U.K. criminal law extend to acts committed both abroad and by foreign nationals.

¹⁷ Anti-Terrorism, Crime and Security Act 2001, s.109.

¹⁸ Approximately 1.825 million zloty.

Once the disclosure is made to NCIS, it very often happens that law enforcement will wish the institution to continue with the business relationship and to process transactions as instructed by their client. It is by so doing that the client's affairs can be monitored, possible accomplices identified and accounts located where funds are ultimately hidden. If the account is simply closed or rejected, this opportunity will be lost. Furthermore, the client, if he is indeed involved in crime, may become nervous and be more careful about his approaches to financial intermediaries in future; hence future opportunities to monitor him may not be forthcoming. The Act, as did the previous legislation, therefore permits the institution, with the authorisation of law enforcement, to proceed with transactions that would otherwise fall foul of this provision and continue with the relationship.

This does not, however, mean that all is then well with the institution (although individual members of staff will be safer.) This paper deals with criminal liability, but it is worth noting in passing the other risks that remain if the institution adopts this approach. If the funds are ultimately lost as a result of the bank processing the transaction(s), albeit with police authorisation, the victims of the crimes may later bring civil proceedings against the institution as a constructive trustee. In addition, the whole story may well come out, resulting in serious damage to the institution's reputation. A case in point is that of the Bank of New York. When the story hit the world's headlines that two of its staff had been laundering money through the Bank for senior figures in Russian criminal organisations, the Bank of New York's management had in fact been cooperating with law enforcement for about a year. This was, however, not widely reported: the story that went out was "Bank of New York Laundering Russian Mob Money!" The damage to its reputation and hence loss of business that resulted was considerable. If the losses to a financial institution become too great, redundancies are bound to follow. And as strict liability is introduced for money laundering, how easy will it be for a former employee of an institution tainted by such allegations to find work elsewhere in the financial sector?

The result has been an increasing wariness by institutions to accept certain types of new business. It is just too risky and the consequences of things going wrong are just too great. Just how reluctant banks have become to accept certain new clients may be seen from the following example. This took place in the summer of 2002, shortly before the new Act was passed but when its provisions were already well publicised. As part of a training programme in Southern Africa, two Lesotho nationals were appointed as Visiting Fellows, for a period of 3 months, to undertake research at the Institute of Advanced Legal Studies in London. The programme was funded by a highly respected international charity based in the U.K. and this funding covered, *inter alia*, the Fellows' living expenses in London. Since the cost of living in London is quite high and the expenses for 3 months would therefore come to rather more than one comfortably keeps in cash, it was proposed that each receive it in the form of a cheque, to be paid into a London bank account that they were to open for the purpose. Each of the four main retail (or "High Street") banks in England, Natwest, Lloyds TSB, Barclays and HSBC, declined, however, to open accounts for the two. The Fellows' supervisor at the Institute explained to banks' staff who the two individuals were and that this would be confirmed by means

of references with the Institute's letterhead. Bank references could also be provided from the National Bank of Lesotho. Furthermore, the cheques paid in would be drawn on the account of the University of London. This made no difference: the bank staff did not wish to open the accounts. And, one might say, with the prospect of up to 14 years in jail for getting it wrong, who can blame them?

The offences of making arrangements and of acquisition, use and possession of criminal property are very much as they were under the previous legislation, as is that of tipping off. The scope of the offence of tipping off has, however, caused considerable concern amongst financial institutions. As seen above, the offence includes the disclosure of "any matter" that might prejudice a money laundering investigation. This, it has been said, could include the sudden closure of an account or refusal to process a transaction. In the case of new accounts, there is little difficulty: the institution can simply decline the prospective client's business without any hint of what is behind it; indeed, as seen above, this happens with increasing frequency as the anti- money laundering rules tighten. But with existing clients, it is more complicated.

Imagine the following scenario. Bloomsbury Bank plc has for a number of years had a client, Colin Davies, on its books. His account has always been in order and indeed over the years he has bought a number of financial products from the bank. But last week, Davies received into his account a transfer of US\$70,000 from Sunshine Holdings in the Marshall Islands. He has now instructed his Account Manager, Emma Forsyth, to transfer £30,000 to the account of San Domenico Investments at Banca di Padania in Milan. Ms. Forsyth's reporting obligations are clear, but how is she to handle Davies and the transfer instruction? She may, under some pretext, invite him for a meeting to discuss his account, but time is short: Davies will expect the bank to make the transfer and if there is a delay, he will want to know why. What can she tell him that will not alert him to the possibility of an investigation? By this point, the bank's management may well have decided that Davies' business is a little too risky for them and they would prefer him to make arrangements elsewhere. It will be down to Ms. Forsyth, as his Account Manager, to inform him of this. Any customer will want an explanation for their bank account suddenly being closed and as someone who considers himself to be a good customer, Davies will want a very good one. Indeed, if he accepts the closure of his account without demur, this is likely to be a strong indication that he realises what is going on. If he does, Ms. Forsyth may well find herself guilty of tipping him off.

Law enforcement agencies assure the financial sector that they want their co-operation and that they are therefore not going to go after financial intermediaries or their staff who act in good faith. But the institutions, and those who advise them, are nonetheless worried. There remains a fear that if, to carry on with the above scenario, Davies scents the attention of law enforcement and successfully flees, there will be pressure to seize at least one scalp - and Emma Forsyth's will be the nearest to hand.

It has been seen above that under the current legislation, there is only an absolute duty to report suspicion of money laundering in respect of drug trafficking and terrorism. Where laundering of the proceeds of other types of crime is suspected, the institution and its

employees have the option of simply turning the client away. Moreover, because no report will be made, there will be no risk of committing the offence of tipping the client off. Under the new Act, however, this will change. Any person whose business is in "the regulated sector" and who through the course of that business comes to know or suspect that another person is engaged in money laundering must report this.¹⁹ It makes no difference what type of money laundering is involved, ie. from what type of crime the proceeds derive (or are suspected to do so). Knowledge or suspicion of any kind of money laundering must, once the Act comes into force, be reported. Failure to do so carries up to 5 years' imprisonment.

The Act also extends the scope of the offence in another key respect. The duty to report arises not only where a person knows or suspects that another person is engaged in money laundering but where they have reasonable grounds to know or suspect this.²⁰ It is not quite strict liability, but it has been rightly pointed out that this provision, for the first time in the sphere of financial services, introduces a prison sentence for negligence. The thinking behind the provision was that there are those in financial institutions who, if any room was left to them to do so, would turn the Nelsonian blind eye in order to gain the business and accompanying commission. It was considered essential to make it impossible for them to do so.

There were also two other influences. Firstly, any kind of subjective test is notoriously difficult to prove. How is a prosecutor to prove, particularly beyond reasonable doubt, what a person did or did not actually know or suspect? It may be easy enough to say that he should in the circumstances have been suspicious but it is very difficult to take a jury inside the defendant's head and prove that he was. Many a defence barrister (including this writer!) has successfully pleaded that his client was incompetent, or even stupid, but honest. If there was to be a remotely realistic prospect of conviction, an objective test was required.

The second influence was the EU Second Money Laundering Directive²¹, which amends the Directive 91/308/EEC. Under Article 1(C) of the amended Directive, "knowledge, intent or purpose ... may be inferred from objective factual circumstances." But the Act arguably goes further than this. An inference, as prescribed by the Directive, may be rebuttable. The Act states, in effect, that it is immaterial whether the defendant actually knew or suspected or not; if there were reasonable grounds for him to do so and he did nothing, he is guilty.

Those types of business which fall within "the regulated sector" are listed in Schedule 1, paragraph 1 of the Act and include banks, building societies, investment firms, life insurance firms, bureaux de change, money transmission offices, in other words virtually all types of financial services business. They also include lawyers who engage in investment business.

¹⁹ Section 330.

²⁰ Section 330(2)(b).

²¹ Directive 2001/97/EC

For the first time, the person to whom the report is required to be made is not "a constable"; they are explicitly stated to be "a person authorised ... by the Director-General of the National Criminal Intelligence Service". Alternatively, the report may be made to a "nominated officer". This, as before, is a person appointed under the institution's systems to receive reports from employees of knowledge or suspicion of money laundering. This will be the Money Laundering Reporting Officer or MLRO, which a financial institution is obliged to appoint. The MLRO is a member of staff with the principal responsibility for ensuring that the anti- money laundering measures are carried out. For some years, they were often quite a junior employee, something which in the view of some reflected a low priority given to guarding against money laundering. More recently, however, the rules imposed by the financial regulators (now the Financial Services Authority or FSA) have required that both the MLRO and the Compliance Officer (where they are not one and the same person) should be senior members of staff. They are generally not, however, actually members of the board of directors, although in a law firm, the MLRO will usually, if not invariably, be a Partner.

The MLRO is to receive reports of knowledge or, more usually, suspicion of money laundering from other employees of the institution. He then judges whether the facts set out in those reports genuinely do give rise to a suspicion or even awareness that money laundering is indeed being carried out. If he decides that they do, he must then report this directly to NCIS. If, on the other hand, he decides that the facts do not in fact give rise to such a knowledge or suspicion, he need not make a report (indeed, he may be at risk of civil liability if he does), but he would be well-advised to keep on file a record of this decision and the reasons for it.

Other responsibilities of the MLRO, particularly as he frequently also exercises the functions of the Compliance Officer, include advising employees whether they are to proceed with a transaction that they consider suspicious. The difficulty and pressure involved in this may be appreciated when one considers that, in an investment firm, a trader will expect a decision within a few seconds. In a law firm, there is generally a little more time, but the responsibility is still considerable. Finally, the MLRO is responsible for arranging adequate training for the staff in the danger signs of money laundering and also their own responsibilities under the Money Laundering Regulations, such as customer identification and record keeping, as well as the wider "know your customer" procedures. Discussing the latter in depth takes up a paper of its own; in essence, it consists of maintaining a good working knowledge of the client and his affairs such that unusual transactions or patterns are easier to identify and the employee who deals with that client can be satisfied that anything which might arouse suspicion can be satisfactorily explained.

There are a number of exemptions to the requirement to make a report. Firstly, as before, lawyer-client privilege is protected, provided that the lawyer is not involved in the furtherance of a criminal purpose. Secondly, where a person had a reasonable excuse not to make a report, this is a defence. The Act does not provide guidance as to what "a reasonable excuse" might be, especially as it elsewhere provides that the report must be made "as soon as is reasonably practicable" (hence an excusable delay is already

covered). One example is, however, given as a separate defence. As an exception to the "reasonable grounds" rule, a person is exempt from making a report where:

- they neither knew nor suspected that money laundering was taking place; and
- they had not received the anti- money laundering staff training that the firm is obliged to give them under the Money Laundering Regulations.²²

Finally, under section 330(8), the court, when deciding whether or not a person is guilty of failure to make a report, must consider any guidelines, which were issued by a supervisory body (in practice, the Financial Services Authority), approved by the Treasury and published in such a way as the supervisor felt would bring it to the attention of those whom it affected.

Nominated officers in the regulated sector are covered by a separate section: section 331. This is, however, identical to section 330 save that the report must be made solely to NCIS. The provisions regarding nominated officers outside the regulated sector, contained in section 332, do not refer to the FSA guidance but are otherwise identical to those for the regulated sector.

The main provisions of the Money Laundering Regulations have already been referred to. They were introduced in 1993 in order to implement the EU Money Laundering Directive, 91/308/EEC. It should be noted that they, too, impose liabilities on the employees of financial institutions. When opening an account or commencing a business relationship with a client, the person dealing with that client must obtain adequate forms of identification and keep a record of them on file.²³ These forms of identification must also be obtained in respect of any one-off transaction involving more than €15,000.²⁴ This is a direct requirement from the Directive and is stated in euro in order to ensure that fluctuations in exchange rates do not lead the U.K.'s legislation no longer to comply with it.²⁵ As mentioned above, the MLRO or Compliance Officer must ensure that regular training is provided to staff in order to ensure both that they know the institution's systems for preventing money laundering and also that they are aware of the signs which could indicate money laundering.²⁶ Failure to comply with any of these requirements is punishable with up to 2 years' imprisonment.

Terrorism

Brief mention should be made of the provisions relating to terrorist funding. As mentioned above, this needs to be dealt with separately since much of the funding of terrorist organisations comes from otherwise legitimate sources. Sections 15 and 16 of

²² Section 330(7)

²³ Regulations 7ff.

²⁴ Approximately 61,120 zloty.

²⁵ The current sterling equivalent is approximately £9,500.

²⁶ Regulation 5

the Terrorism Act 2000 prohibit any person to receive, provide or use money or other property which the person intends to be used for terrorist purposes or where he has reasonable grounds to suspect that they may be so used. Such property is designated "terrorist property". Section 17 prohibits any person from entering into or being concerned in an arrangement whereby property is made available for the purposes of terrorism and he knows or has reasonable grounds to suspect this. Finally, sections 18ff. contain essentially identical provisions in relation to terrorist property to those that the Proceeds of Crime Act 2002 has introduced in relation to money laundering; the only difference is that, as with the legislation that preceded it, there are not separate provisions for nominated officers.

It will be seen that there will be some cases where an act or omission may be covered by both the Terrorism Act 2000 and, once it comes into force, the Proceeds of Crime Act 2002. Examples include where a terrorist organisation carries out an armed robbery, maintains an extortion racket or is engaged in drug trafficking or smuggling. The latter refers not just to drugs but also to otherwise legal goods which are subject to customs duties, such as alcohol, cigarettes and petrol or diesel and is an important source of funding in Northern Ireland for the Provisional IRA. All of these are criminal offences and hence their proceeds will be covered by the Proceeds of Crime Act 2002. But because those proceeds are intended to be used to fund acts of terrorism, they are also covered by the Terrorism Act 2000. In fact, however, the difference is not important since the penalties laid down under the two Acts are the same: up to 14 years' imprisonment for laundering-related offences (and also for funding terrorism), 5 years for failure to make a report.